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April 23, 1997

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Hon. Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Re: *Amendment of the Commission's Rules to Relocate the Digital Electronic
Messaging Service From the 18 GHz Band to the 24 GHz Band and to Allocate
the 24 GHz Band For Fixed Service, ET Docket No. 97-99*

Dear Chairman Hundt:

WebCel Communications, Inc. ("WebCel") is writing to express its grave concern with the recent decision by the Wireless Telecommunications Bureau to substantially expand the spectrum allocated to Digital Electronic Messaging Service ("DEMS") -- without public notice or comment and without considering the applicability of the Commission's spectrum auction authority. The result of the above-referenced order ("*DEMS Order*") is that one wireless license aggregator, whose rights to DEMS licenses are already open to serious question, may now obtain a four-fold increase in its spectrum holdings **without any payment and without any public scrutiny**. At the same time, other wireless providers, including those in PCS and LMDS, will be required to pay substantial sums at auction in order to offer competing types of broadband services. This decision is at the very least unfair, is likely unlawful, and is at the worst an illustration of inter-agency and Wireless Bureau policy breakdown.

WebCel believes the irregularities in the *DEMS Order* require close reexamination by the full Commission of the Bureau's actions in order to eliminate both inconsistent spectrum auction decisions and the appearance of outright favoritism to one company which seeks to control nearly every 18 GHz license in major United States markets. We therefore strongly urge the Commission to refrain from issuing modified licenses to any DEMS incumbents, including Associated Group, Inc. and its directly "affiliated" entities, until after reconsideration of the *DEMS Order* and resolution of these serious questions of procedure and policy.

A Spectrum Giveaway for DEMS is Contrived and of Questionable Legality

On March 14, 1997, the *DEMS Order* relocated the DEMS allocation from 18 GHz to 24 GHz and increased the size of individual DEMS channels by a factor of four. After years of

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orderly, open and painstaking rulemakings regarding this frequency band, the *DEMS Order* was inexplicably rushed to consummation without public notice and comment; the proceeding was concluded on an expedited basis and deemed subject to the "military" exemption to the Administrative Procedure Act ("APA") requirements for "sunshine" on agency proceedings. Moreover, the *DEMS Order* sets forth a process for protesting the modification of authorizations held by incumbent 18 GHz DEMS licensees that recognizes *only* protests filed by the licensees themselves and which ended on April 14, before the *DEMS Order* has even appeared in the Federal Register.

WebCel has serious concerns regarding the legal, technical and policy ramifications of the *DEMS Order*.

- **The Closed and Expedited Bureau Decision Was Improper.** Even if use of the military exemption to the APA were legitimate to terminate DEMS operations in and around Denver and Washington, D.C., application of the exemption to modify the DEMS rules in 29 more geographic markets (let alone nationwide) is clearly unjustifiable. This is especially true where, as in this case, there are weighty technical and spectrum policy issues at stake and there was absolutely no need for expedition. (The *DEMS Order* indicates that, due to the schedule for decommissioning FAA systems currently using the 24 GHz band, replacement spectrum for any existing 18 GHz DEMS operations in the Washington, D.C., area will not be available until January 1, 1998.) In the absence of any justification for either secrecy or speed, the Bureau's actions can only be viewed as premature, unlawful, and in need of timely Commission correction.

- **The Validity of Associated's Licenses Was Not Considered.** The *DEMS Order* fails to consider well-documented allegations that Associated deceived the Commission, that the Associated 18 GHz spectrum was unlawfully aggregated, that it was substantially warehoused in violation of Commission rules, that construction was not completed for many of Associated's DEMS systems, and that the "systems," to the extent they exist, are neither sufficiently built-out nor serving revenue-producing customers. These allegations, if true, would disqualify Associated from holding DEMS licenses and would necessitate forfeiture of the licenses -- as was the case when the Commission recently sent DBS back to auction. Instead, the weighty allegations were ignored by the Bureau in its haste to broker a deal between Associated and its former adversary, Teledesic. Even though the original complainant has now been placated by the deal closed behind doors, the Bureau and the Commission have a longstanding and independent obligation to fully examine the validity of Associated's status as a DEMS licensee. Teledesic's allegations merit a public hearing *before* the Commission makes any final determination on relocation of the DEMS spectrum.

- **Critical Spectrum Policy Considerations Were Not Addressed.** The *DEMS Order* does not consider the competitive and capital market impacts of the new DEMS allocation on existing and planned services, such as PCS, MMDS and LMDS, or the impact of awarding 18

GHz incumbents substantial amounts of spectrum that will be used to compete with other services subject to the auction process. Requiring some new entrants to bear the capital costs associated with auctions, while permitting others free access to spectrum despite the 1993 congressional mandate for spectrum auctions, undermines market efficiency and network technology deployment by artificially increasing the cost structure for some, but not all, new wireless competitors. More broadly, *a Commission spectrum "policy" divided against itself cannot stand; leaving this nation's spectrum assets half-free and half-auctioned is a recipe for collapse*. The capital markets in this country -- already skittish about investing additional resources in wireless auctions in light of the Commission's inconsistent spectrum decisions -- may not devote substantial additional capital toward spectrum auctions *where some competitors suddenly are handed large amounts of free spectrum*. The *DEMS Order* thus highlights the absence of a coherent Commission spectrum auction policy that has resulted in *ad hoc* spectrum decisions which lack consistency, predictability, and fairness, as well as statutory justification. The giveaway of DEMS spectrum also means that the public has been denied the fiscal benefits, *as much as \$1-2 billion for this spectrum*, anticipated by Congress when it mandated spectrum auctions.

- **The DEMS Order Appears to Provide a De Facto Monopoly for Associated.** The *DEMS Order* provides a *de facto* monopoly for Associated in at least 14 top U.S. markets, in direct contradiction of current Commission rules, still in place, which encourage multiple DEMS competitors in each market. The Bureau's decision fails to note that the number of DEMS channels is being halved at the same time that the size of each channel is being quadrupled. The Associated Group controls all of the authorized channels in 14 markets and up to 80% of the authorized channels in 17 other major markets. Thus, the Bureau's decision to reduce the number of available DEMS channels in the 24 GHz band by one-half effectively provides Associated with a monopoly in the best markets nationwide for new DEMS allocations at 24 GHz. This is of course contrary to the Commission's long-standing policies favoring competition and multiple entry.

- **No Technical Documentation Supports Quadrupling DEMS Spectrum.** Further public consideration must be given to the matter of sizing the DEMS channels in the 24 GHz band. The *DEMS Order* offers a cursory justification for adopting a 4:1 equivalency, but this brief, one-page technical analysis relies on faulty premises, fails to address a number of basic questions, and was conducted without any outside third-party critique or input.

- ◊ **First**, the cost of equipment supposedly relied on by the Bureau is completely irrelevant as a policy and legal matter to the technical requirements for spectrum allocation needed to reduce signal attenuation. Nothing provides Associated with any property rights in spectrum justifying this sort of "make whole" government compensation, and it cannot show any appreciable cost impact of frequency

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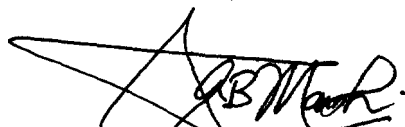
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relocation on current network equipment or CPE, because Associated has little or none of either installed.

- ◇ **Second**, since Associated does *not* have a network in place and is *not* serving any appreciable customer base, the Bureau's approach becomes a contrivance which rewards Associated for having built virtually nothing. The Commission's construction rules and spectrum warehousing prohibitions are designed to avoid just this sort of speculative acquisition of spectrum licenses.
- ◇ **Third**, the Bureau's analysis assumes that more of the incumbent's existing equipment investment can be preserved by adopting a 4:1 equivalency. This fundamental premise, however, does not appear to be justified -- but rather provides a huge economic windfall to Associated, even *if* there are equipment cost consequences to frequency relocation -- and at a minimum should be subject to public comment.
- ◇ **Fourth**, in light of the low-power nature of Associated's 18 GHz licenses, higher-power operations could be authorized consistent with the existing service rules. This would achieve the same capacity and service area equivalence, and would avoid any alleged need to increase the DEMS bandwidth whatsoever.

In sum, WebCel believes that there are a number of serious legal, technical and policy issues ignored by the *DEMS Order* that should rightfully have been examined in the context of a public proceeding. WebCel intends to seek formal reconsideration of the *DEMS Order*. Since action on the 18 GHz license modifications now by the Wireless Telecommunications Bureau would affect the balance of equities during the pendency of the reconsideration and only add to the appearance of an improper "rush to judgment," WebCel requests that the Commission maintain the *status quo* by deferring issuance of any DEMS license modifications until a thorough reconsideration has been completed.

Sincerely,



Glenn B. Manishin

Counsel for WebCel Communications, Inc.

cc: Commissioner James H. Quello
Commissioner Rachelle Chong
Commissioner Susan Ness
(more cc's on following page)

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Daniel Phythyon, Acting Chief, Wireless Telecommunication Bureau

Howard Davenport, Chief, WTB Enforcement Division

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